The Law of the Sea and Democracy

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ABSTRACT

The law of the sea is not an area of international law generally associated with democracy. The United Nations Convention on the Law of the Sea (UNCLOS) is one of the world's most broadly accepted and effective treaties, incorporating all kinds of States. The central cleavages among these states—coastal vs. maritime powers, developing countries vs. industrialized nations, landlocked vs. those with access to the seas—have only coincidental links to the global division of democracy and dictatorship. Yet, the law of the sea has surprising connections with democracy in that democratic states are enthusiastic users of the UNCLOS system. Furthermore, the oceans, so long viewed as a zone free of national jurisdiction, are increasingly an arena for domestic struggles within democratic countries. The institutional structures of the UNCLOS shape, and will likely continue to shape, the availability of the seas as a space for democratic contestation. Finally, the interaction between the law of the sea and democracy is beginning to receive pushback from authoritarian regimes concerned with security. In this sense, what I have elsewhere called "authoritarian international law" is beginning to rear its head.

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DEDICATION

It is a tremendous personal and professional honor for me to deliver this Scheiber lecture on the law of the sea. Harry and the late Jane Scheiber have been central pillars of the Berkeley campus for many decades, and before beginning my substantive remarks, I would like to say a word about each of them and their sixty-three-plus year personal and professional partnership that came to a close with Jane's passing, just days before this lecture was given.

Everyone who encountered Jane knew her as a person of incredible kindness, grace, and brilliance, but we learned in her final months of another of her great virtues: bravery in the face of painful illness. She was an incredibly accomplished professional, being one of a small number of administrators to win The Berkeley Citation, the campus' highest honor which she joined Harry in receiving. She was also a scholar of incredible care and insight, yet someone who shunned the limelight. Like Harry, her dedication to the campus was matched only by her dedication to friends and family, and I feel fortunate to have been one of those friends.

Harry's contributions to the law of the sea are evidenced in his scholarly output and institutional leadership. By my count, he has authored more than forty articles and book chapters and edited nine volumes on the topic. Several of these involved the late Professor David Caron, his partner in running the Law of the Sea Institute. Harry's dedication is all the more remarkable because ocean governance is only his third or fourth field, which include American constitutional history and federalism, economic development, modern Japan, and other topics. He is a person of tremendously diverse interests, which he pursues with rigor and academic drive, and always with an eye to the development of Berkeley as an institution. Harry's willingness to follow his interests has been a source of tremendous support and inspiration to generations of students. Together, Jane and Harry have provided a model of personal and professional partnership that most of us can only aspire to, I proudly dedicate these words to them.

I.

The law of the sea is not an area of international law generally associated with democracy. It dates from the time of the Romans and has been central to modern international law since Hugo Grotius wrote his famous tract *Mare Liberum* in 1609, well before any notion of mass democracy. The United Nations Convention on the Law of the Sea (UNCLOS) is one of the world's most broadly accepted and effective treaties, incorporating all kinds of States with all kinds of governments. The central cleavages among these States have been related to distributive conflicts: between coastal states and maritime powers; between landlocked countries and coastal states; between developing countries and developed countries (as in the struggle over the deep seabed regime embodied in Chapter XI of the UNCLOS treaty); and between flag states and those that wish to enforce the rules in maritime zones.[1] These conflicts have only coincidental connections to forms of government, as there is no reason to think that any one of them is more likely to correspond to democracy or dictatorship. Indeed, the rapid development of the law of the sea between World War II and the 1982 UNCLOS must be considered one of the great areas of progress of international law during the long Cold War. Both democracies and dictatorships participated in and ultimately agreed to the "Constitution of the Oceans," as the UNCLOS is also known.

Yet, this lecture will argue that the law of the sea has surprising connections to democracy. Drawing on my recent book, *Democracies and International Law*, I will show that States participating in the negotiations and discussions about the law of the sea are more likely to be democratic.[2] Democracies are also more likely to engage in adjudication over maritime issues. These facts mean that, notwithstanding its generally technical and apolitical character, the law of the sea is one area of international law in which the interests of citizens of democracies seem to be extraordinarily well-served.

I will also argue that the oceans, long thought of as free of national jurisdiction, are increasingly arenas for domestic struggles *within* democratic countries. In this section of the lecture, I trace the history of protest at sea, which is driven by private actors who advance particular policy positions through direct and expressive action. Protest at sea has profound implications for how we think of the oceans. They are not only arenas for the struggle over resources,

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[1] *See generally* DAVID BOSCO, THE POSEIDON PROJECT: THE STRUGGLE TO GOVERN THE WORLD'S OCEANS 10-15 (2022).
[2] *See* TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW (Cambridge 2021).

commercial activity, and the pursuit of scientific knowledge, but are also sites of public participation, democratic contestation, and political conflict. Increasingly, the struggles are transnational, involving civil society cooperating across borders.

In this section, I briefly speculate on whether the recent resurgence of authoritarian powers, especially China and Russia, will impact the law of the sea. Drawing on the concept of "authoritarian international law," I show that the rise of authoritarian powers, with their distinct approach to international law and practice, may affect the substance of this area of law, as it has many others.[3]

The final section focuses on transnational contests over migration policy in Europe during an era of massive flows of people fleeing poverty and conflict. As the European Union has broadened its role in coordinating policy for its member states, counter-movements are apparent as civil society actors seek to undermine government policy. The open seas, it turns out, tell us something about the nature of democracy in the twenty-first century: it is messy, it spills beyond territorial borders, and it confronts a set of authoritarian governments that have very different policy goals.

II.

Democracies and International Law is an intervention into a long literature on whether international law is or should be pro-democratic in character. There are many international legal rules and institutions that support the development of citizen participation, free speech, and the rule of law, and so there are ample international resources to contribute to the development of democracy on the national plane. Indeed, in the early 1990s, scholars considered whether there was a "right" to democratic governance, such that international law could actually be said to *require* democracy.[4] At the same time, another line of work has emphasized that a functioning international legal order must recognize the basic fact of pluralism, which is a condition of the world in which we live. States have diverse, and divergent, approaches to basic questions about how to organize society and what policies to pursue. Accordingly, international law must

[3] *See generally* Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT'L L. 221 (2020).
[4] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90-91 (1992). *See also* Fernando R. Tesón, *Two Mistakes about Democracy*, 92 PROC. ANN. MEETING AM. SOC. INT'L L. 126 (1998); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113 (1993); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad Roth eds., 2000); Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507 (2011).

accommodate differences among States that have very different moral and political characters.[5] As between a universalist and pluralist perspective, I tend toward the latter view, in part informed by my empirical sensibility. Even a cursory glance around the world suggests that democracy is neither possible, nor perhaps even desirable, in every country on Earth. This is particularly true in an era of democratic backsliding, in which the majority of States are not democracies and the majority of the world's citizens live in non-democracies.[6] For many areas of international law, especially those of a technical or apolitical character, the type of government a State has is irrelevant. The only questions we ask are what commitments has it taken on and have those commitments been upheld?

This does not mean that democratic governments behave in the same way as authoritarians. One of the major arguments of *Democracies in International Law* is that the character of democratic governments provides them with different incentives to cooperate with other countries. Because leaders in democracies have to respond to the concerns of their citizens but also know they will leave office, they benefit from cooperating with other countries and embedding their commitments in the form of law. Democratic leaders value the public and transparent nature of their commitments and the availability of third-party dispute resolution. *Democracies in International Law* demonstrates that in a wide range of areas, democracies are more likely to utilize international law than authoritarians.[7] For example, democracies are more likely to sign bilateral treaties.[8] They are more likely to bring claims before the International Court of Justice.[9] And their representatives are more likely to speak at meetings of the International Law Commission.[10]

What happens when we examine the role of democratic States in the law of the sea? As it turns out, democratic States are over-represented in many international regimes related to ocean governance. Consider the international whaling regime, something Harry Scheiber has himself written on.[11] The International Convention for the Regulation of Whaling, signed in 1946, followed

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[5] BRAD ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011).
[6] GINSBURG, *supra* note 2, at 9.
[7] *Id.*, at 60-102.
[8] *Id.* at 63.
[9] *Id.* at 87-92.
[10] *Id.* at 95.
[11] Harry N. Scheiber, *Historical Memory, Cultural Claims, and Environmental Ethics: The Jurisprudence of Whaling Regulation*, in LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 127 (Harry N. Scheiber ed., 2000); HARRY N. SCHEIBER, INTER-ALLIED CONFLICTS AND OCEAN LAW, 1945-53: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND FISHERIES (2001).

a 1937 Agreement for the Regulation of Whaling.[12] The 1937 Agreement and the 1946 Convention each had only two non-democracies among their signatories. [13] These frameworks built on a 1931 Convention for the Regulation of Whaling, adopted under the auspices of the League of Nations, which was similarly dominated by democratic states.[14] The purpose of the whaling regime has evolved dramatically as it shifted from a club of whaling nations to one with some scientific guidance to a conservationist body beginning in 1986.[15] This shift in focus itself reflects the changing substantive views in democratic nations as environmental concerns came to the fore in the 1960s and 1970s. Citizen movements, demanding the protection of endangered species, had a direct effect on the international regime.[16] In addition, the emergence of what Scheiber calls "the Aboriginal exception"—namely that first nations should have special carve-outs to whaling bans to preserve their cultural practices—paralleled similar developments within the governance of constitutional democracies.[17] And of course, nations like Japan, which have sought to protect traditional practices of their own discrete communities of whalers, have also invoked the cultural exception, in part because of a sense of responsibility to domestic interest groups.[18] In other words, democracies clash over outcomes demanded by their citizens and special interest groups, and the international regime is a forum for that contestation.

The dominant position of democracies in the international order following World War II drove the development of numerous other international schemes. The International Maritime Organization (IMO), for example, a specialized agency of the United Nations, has a whole series of conventions

[12] International Convention for the Regulation of Whaling, Dec. 2 1946, 161 U.N.T.S. 74; International Agreement for the Regulation of Whaling (with Declaration), June 8 1937, League of Nations, 190 L.N.T.S. 80.

[13] The 1937 Agreement's non-democratic signatories were Germany and South Africa. *See* International Agreement for the Regulation of Whaling, Nature 180, 181 (July 31, 1937) (signatories were Australia, United States, United Kingdom, Irish Free State, New Zealand, Norway, Germany and South Africa). Of the 1946 Convention's fifteen signatories, the USSR and South Africa were the only non-democracies.

[14] Convention for the Regulation of Whaling, Sept. 24 1931, 155 L.N.T.S. 351. Of 18 ratifying states, only Mexico, South Africa and Turkey would be considered non-democracies at the time. For a list of signatories, *see* L. Larry Leonard, *Recent Negotiations toward the International Regulation of Whaling*, 35 AM. J. INT'L L. 90, 100 (1941).

[15] Scheiber, Historical Memory, *supra* note 11, at 128 ("The IWC underwent transformation form a "whalers' club" first to a whalers' club with scientific guidance, and then since 19896 to a conservationist body which at present seeks to impose an entire moratorium on high-seas whaling.")

[16] *Id.* at 138.

[17] *Id.* at 142-46.

[18] *Id.* at 142-46.

governing things like vessel safety, marine pollution, and the security of shipping.[19] Countries may sign onto such conventions as they wish. As of 2021, democracies had signed an average of twenty-nine of IMO conventions, while non-democracies had signed an average of eighteen.[20] For example, sixty-seven percent of countries that signed the IMO Convention on Marine Pollution of 1978 were democracies.[21]

All of this is consistent with the argument that democratic governments are incentivized to produce public goods for their citizens, and that sometimes these public goods require cooperation across borders. Authoritarians, by contrast, seek to limit benefits to the ruling coalition, and so tend to have agreements with less onerous commitments.

The development of the UNCLOS itself also reflects the relatively active role of democracies as compared to dictatorships. As one of the international conventions with the widest accession, one might think democracies and dictatorships would be equally likely to sign and ratify it. One-hundred-eighty-two States have signed UNCLOS, and only fourteen United Nations members have not.[22] But only three of these non-signatories are democracies: Andorra, Israel and Peru. Of the States that have signed, fifteen States did not ratify the convention after signing. Only four of these (26 percent) were democracies—namely the US, Colombia, Liechtenstein, and El Salvador. This means that during a period, from 1982 to today, in which democracies were more than half of countries in the world, they were under-represented in the set that did not join the UNCLOS.

Another measure of the relative influence of democracies is their participation in meetings at which international conventions are adopted. Consider several international treaties related to the oceans. For each, I provide information on the number of comments in the meetings by representatives of democracies and non-democracies, excluding the chairs. The table indicates the over-representation of democracies in terms of active participation in these meetings, with the exception of the UNCLOS III.

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[19] *List of IMO Conventions*, INTERNAT'L MAR. ORG., https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx (last visited Jan. 1, 2023).

[20] Data available at https://comparativeconstitutionsproject.org/download-data/. A t-test shows that the difference was significant at t=-7.05.

[21] Data available at https://comparativeconstitutionsproject.org/download-data/.

[22] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

TABLE 1: COMMENTS BY REPRESENTATIVES AT MEETINGS[23]

	% democracies In the world	**% comments by representatives of democracies**
Int'l Law Commission on territorial waters and high seas (1950-56)	40%	76%
UNCLOS I (1956-58)	40%	68%
UNCLOS III (1973-82)	34% to 42%	36%
UNCITRAL Int'l Transport	52%	83%

As has been argued by students of the UNCLOS, including Scheiber himself, one of the remarkable features of the iterated negotiations that produced the 1982 Convention was the important role of small States.[24] The chair of the first UNCLOS convention was Prince Wan Waithayakon of Thailand, and Sri Lankan and Yugoslav delegates were frequent speakers.[25] The critical role played by Ambassador Arvid Pardo of Malta, sometimes called the "Father of the

[23] Data available at https://comparativeconstitutionsproject.org/download-data/.
[24] Willy Ostreng, *Small States in the Decision-Making Process of UNCLOS III, in* OCEAN LAW DEBATES: THE 50-YEAR LEGACY AND EMERGING ISSUES FOR THE YEARS AHEAD 216, 222 (Harry N. Scheiber, Kilufer Oral & Moon-Sang Kwon eds., 2018).
[25] Data available at https://comparativeconstitutionsproject.org/download-data/.

Convention," has been well documented. He drew on earlier ideas of the "common heritage of mankind" to argue that the resources of the deep seabed should be used for the developing countries of the world.[26]

While the common heritage idea was an effort to benefit the majority of humanity, the fact that smaller States played an important role is not itself an indicator of democracy. The international legal system, after all, places fundamental importance on the sovereign equality of States, but the underlying inequalities among these States means that we cannot be sure a decision adopted by a majority of States is itself democratic. The majority of States might be made up of dictatorships, or they might simply be small: the largest seven countries collectively have more than 50 percent of the world's population.[27] Thus, the fact that the UNCLOS has empowered small States is not *inherently* democratic, but it also does not mean that the UNCLOS is biased toward authoritarians. The seas and their governance ultimately embody what I call "general" international law, neither inherently pro-democratic nor pro-authoritarian.[28] But the role of democracies in producing the content of this important body of law means that one can view it as indirectly reflecting the interests of democratic States, and thereby contributing to the well-being of their citizens.

The same is true when we turn to the question of dispute resolution. Article 287 of the UNCLOS provides governments with a choice of dispute resolution options. Upon accession, the State party can select the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice, or arbitration under the Permanent Court of Arbitration (PCA) as its preferred mechanism of dispute resolution.[29] Annex VII provides details on PCA Arbitration.[30]

Theory suggests that democratic States will be more likely to avail themselves of third-party dispute resolution because the results are less likely to cause sudden surprises.[31] This is exactly what we have observed to date in every forum of maritime dispute resolution. The International Tribunal for the Law of the Sea, which sits in Hamburg, has heard twenty-six contentious cases to date,

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[26] Bosco, *supra* note 1, at 13-14.

[27] The seven countries with more than 200 million people are Nigeria, Brazil, Pakistan, Indonesia, the U.S., India and China. As of 2022, they add up to about 51% of the world's people. *See* COUNTRIES IN THE WORLD BY POPULATION (2022), https://www.worldometers.info/world-population/population-by-country/ (last visited Nov. 4, 2022).

[28] Ginsburg, *supra* note 2, at 48-49.

[29] U.N. Convention on the Law of the Sea, art. 287 (1), Dec. 10, 1982, 1833 U.N.T.S. 397, 509-10 ("When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.") [hereinafter UNCLOS].

[30] Id. at Annex VII.

[31] Ginsburg, *supra* note 2, at 45.

twenty-four of which have been brought by democracies.[32] The ITLOS has mandatory jurisdiction over cases involving "prompt release," which occurs when a country seizes a vessel flagged in another State that demands its release. All nine of these cases brought to date have been brought by democracies.[33]

Examining the other fora contemplated by Art. 287, one also sees a propensity for democracies to bring cases. Appendix II lists all fourteen cases brought before PCA Arbitration to date. For non-democracies, one can only identify the case brought by Bangladesh against India for the delimitation of maritime boundaries.[34] Finally, looking at the history of dispute resolution related to maritime issues at the International Court of Justice, eleven of eighteen special agreements involved at least one democracy, including eight of ten maritime delimitation cases, even though democracies constituted only about 40 percent of States in existence during the period.[35]

This part of the lecture has emphasized a perspective on what I call "democracies and international law." It does not focus on the inherent democratic quality of global governance, nor the international law of democracy itself, but rather asks whether democracies act differently on the international plane. The answer, at least as far as the law of the sea is concerned, is a definitive yes.

III.

We now turn to a second issue, which is whether the law of the sea reflects what might be called "democratic global governance." This question has been asked by a number of scholars who note the distance between international decision-makers and ordinary citizens and seek to understand whether international legal institutions are "democratic" in some sense.[36] Scholars have been examining the internal structures and procedures of international organizations and courts to see whether they reflect and advance democratic

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[32] *See* Appendix I.

[33] Data on file with author.

[34] One may also consider a case brought by Malaysia against Singapore, though Malaysia is a bit ambiguous in measures of democracy.

[35] Ginsburg, *supra* note 2, at 61. Simple math suggests that about 48% of dyads would involve at least one democracy. 16% (.4 x .4) would have two democracies and 36% (.6 x .6) would involve two dictatorships.

[36] *See generally* Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFFS. 405 (2006); Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009); Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORG. 385 (2014); José Alvarez, *Introducing the Themes*, 38 VICTORIA UNIV. WELLINGTON L. REV. 159 (2007); Robert O. Keohane, *Nominal Democracy? Prospects for Democratic Global Governance*, 13 INT'L J. CONST. L. 343 (2015); Grainne de Burca, *Nominal Democracy? A Reply to Robert Keohane*, 14 INT'L J. CONST. L. 925 (2016); Jonathan W. Kuyper & John S. Dryzek, *Real, Not Nominal Global Democracy: A reply to Robert Keohane*, 14 INT'L J. CONST. L. 930 (2016).

values and processes. They tend to look to enhance individual and civil society participation in global governance and promote values like transparency and participation.[37]

In 1958, a group of American Quakers activists sailed a yacht called *The Golden Rule* toward an American nuclear testing site near the Marshall Islands in the Pacific.[38] The United States enacted rules making it illegal to enter the testing zone and a conflict ensued. The activists had an incomplete understanding of the law of the sea as it stood at the time. They departed Hawaii believing that they were entitled to sail freely outside of the three-mile territorial sea but were arrested anyway because *The Golden Rule* was a US-flagged vessel, which the Coast Guard was entitled to board anywhere.[39]

While the activists were unsuccessful in stopping the tests, they inspired others. In 1971, a small group of environmental activists, concerned about underground nuclear tests conducted by the United States, sailed for the Aleutians in a boat they called the *Greenpeace*.[40] They had the foresight to use a Canadian flag so that the boat could not be apprehended by US officials. Although maintenance issues caused them to suspend their mission before they were able to get to the test site, an organization was born, which continues to this day as the embodiment of nonviolent direct action by civil society. And note that the disputants in these early cases were citizens challenging their own governments. This meant that the oceans were also a space for internal democratic contestation: in addition to trying to use national courts or legislation to challenge disfavored policies, activists could engage in direct action and protest outside of a country's borders.

Of course, the broader civil society campaign that followed soon became a transnational one. Greenpeace has, for example, demanded an end to nuclear testing by France and several times engaged in direct action to call attention to the issue. This demand was picked up by States such as Australia and New Zealand,

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[37] *See generally* Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance*, 10 IND. J. GLOB. LEGAL STUD. 45 (2003); STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW (2010); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. CONTEMP. PROBS. 15 (2005); Steven Wheatley, *A Democratic Rule of International Law*, 22 EUR. J INT'L L. 525 (2011); Anne Peters, *Dual Democracy*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 263 (Jan Klabbers, Anne Peters, and Geir Ulfstein, eds., 2009); KAROLINA M. MILEWICZ, CONSTITUTIONALIZING WORLD POLITICS: THE LOGIC OF DEMOCRATIC POWER AND THE UNINTENDED CONSEQUENCES OF INTERNATIONAL TREATY MAKING (2020); RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman, eds., 2009).

[38] BOSCO, *supra* note 1, at 108.

[39] *Id.*

[40] *Id.*

which sued France over the issue in the International Court of Justice.[41] Among the claims were the rights of the applicant States to maintain their freedoms of navigation and fishing, and to ensure their territorial waters were free of pollution.[42] What began as an internal fight within democracies became a transnational conflict, with different democratic States taking different positions. International courts have had to grapple with this conflict among democracies over policy, brought to the forefront by civil society movements that spanned borders.

Another issue Greenpeace has focused on is whaling.[43] Their protest originally took the form of using rubber dinghies to physically position themselves between Pacific Ocean whales and Russian hunters with harpoon cannons.[44] By doing so, Greenpeace prevented the whalers from shooting their harpoon cannons, lest they hit the protesters. About two years after their first direct action on whaling, Greenpeace began the tactic of boarding whaling ships and distributing anti-whaling leaflets to the crews.[45] Over many decades, these tactics were repeated by the organization to prevent whaling by boats affiliated with Australia, Spain, Iceland, Peru, Japan, and other States.[46] In 1982, Greenpeace escalated its direct action approach when activists chained themselves to the harpoon cannon of the *Victoria* 7, a ship owned by a Peruvian subsidiary of Japan's Taiyo Fisheries.[47] In conjunction with pressure on democratic governments, these actions helped lead to a policy change when, that same year, the International Whaling Commission (IWC) voted to enact a moratorium on commercial whaling to begin in 1986.[48] Greenpeace's direct actions continued when countries like Japan violated the moratorium.[49]

The Sea Shepherd Conservation Society, a later and more controversial group of protestors led by Paul Watson, confronted vessels engaged in illegal

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[41] Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1973 I.C.J. 457 (Dec. 20).
[42] *Id.* ¶ 36.
[43] *Greenpeace Campaigns against Whaling, 1975-1982*, SWARTHMORE GLOBAL NONVIOLENT ACTION DATABASE (Oct. 23, 2010), https://nvdatabase.swarthmore.edu/content/greenpeace-campaigns-against-whaling-1975-1982.
[44] "Save the Whales! - CBC Archives." Accessed August 28, 2021. https://www.cbc.ca/archives/entry/greenpeace-save-the-whales.
[45] SWARTHMORE GLOBAL NONVIOLENT ACTION DATABASE, *supra* note 43.
[46] *See generally*, RICHARD ELLIS, MEN AND WHALES (1999).
[47] *Id.*
[48] Philip Shabecoff, *Commission Votes to Ban Hunting of Whales*, N.Y. TIMES, July 24, 1982, https://www.nytimes.com/1982/07/24/us/commission-votes-to-ban-hunting-of-whales.html.
[49] Rob Taylor, *IWC Draft Plan Sees End to Commercial Whaling Ban*, Reuters (Feb. 23, 2010), https://www.reuters.com/article/us-whaling-idUSTRE61M0RF20100223.

whaling and seal hunting.[50] The organization was deputized by the government of Ecuador to patrol waters around the Galapagos and illustrates the potential capacity of civil society groups to act in cooperation with national governments to enforce maritime law.[51] Civil society, based in democratic States, can supplement enforcement capacity of weaker countries, thus making the law of the sea more effective.

Though Greenpeace's direct actions at sea to prevent whaling have led to arrests and litigation, the organization's law of the sea-related litigation has been primarily centered around its other campaigns. The ice-breaking ship *Arctic Sunrise*, for example, was involved in several anti-whaling protests and collided with Japanese whaling vessels. But the ship is most famous for an incident in 2013, when protestors from the vessel were arrested while attempting to scale a Russian oil installation.

The saga of the *Arctic Sunrise* illustrates how citizens of democracies can make things difficult for their own governments.[52] The icebreaker had been used to harass whalers in the Antarctic, but became famous in 2013, when a group of Greenpeace activists sought to land on a Russian drilling rig in the Arctic. The Prirazlomnaya oil platform was located within Russia's exclusive economic zone (EEZ) but not its territorial waters. Greenpeace exploited this fact to claim that it was engaged in innocent passage. Apprehended by the Russians and charged with hooliganism, the crew and ship was initially held in custody.[53] This led to actions before the Law of the Sea Tribunal by the Dutch government, with political support from the United Kingdom, for prompt release.[54] The International Tribunal for the Law of the Sea ordered Russia to release the protesters,[55] which the Russian parliament concurrently granted.[56] A later arbitral tribunal, constituted in accordance with the 1982 United Nations Convention on the Law

[50] BOSCO, *supra* note 1, at 198-99.
[51] *See generally* PAUL WATSON, EARTHFORCE! AN EARTH WARRIORS GUIDE TO STRATEGY (1st ed. 1993); PAUL WATSON, URGENT! SAVE OUR OCEAN TO SURVIVE CLIMATE CHANGE (2021).
[52] Bosco, *supra* note 1, at 224-230.
[53] *Id.* at 225.
[54] The Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation), PCA Case No. 2014-02, Award on the Merits, ¶¶ 81-106 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1438.
[55] The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), No. 22, Provisional Measures, ¶ 105 (ITLOS 2013), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf.
[56] Paula de Castro Silveira & Grace Ladeira Garbaccio, *Protest at Sea: The Arctic Sunrise Case and the Clarification of Coastal States Rights*, 40 Sequência 32, 32-46 (2019).

of the Sea, made a similar ruling regarding the ship and ordered Russia to pay damages.[57] The ship was released in 2014.

This is an instance of what Anne Marie Slaughter and David Bosco have called plaintiff's diplomacy.[58] Though we might think of international law and international relations as primarily involving States, private citizens can complicate foreign policy for a government. Slaughter called attention to how private claim-making and private actions that lead to court cases mean that governments no longer control the international legal docket.

While in this instance the ship was released in accordance with the law, the case did put strain on the ITLOS system because China and Russia now claim the right to exclude outsiders from their EEZs.[59] In 2021, China passed a statute asserting the right to use force against any government vessel in waters over which it claims jurisdiction, in direct conflict with UNCLOS Articles 32, 95 and 96.[60] China has an expansive notion of waters under its jurisdiction, including not only the territorial sea but also the EEZ and the area of the South China Sea within China's "Nine-Dash Line."[61] While it is not clear if China will actually seek to exercise exclusive jurisdiction in these areas, the very proposal is an example of what my book calls "authoritarian international law."[62] In this approach to international law, internal security needs trump adherence to general rules of international law and even prompt an attempt to change them. Whether "innocent passage" survives in Chinese and Russian waters is an issue over which we are likely to see continued contestation.

Civil society groups will continue to shape the law of the sea in many other areas, particularly in the deep seabed mining regime as it comes closer to viability. Since the UNCLOS declared the deep seabed "the common heritage of mankind," scientists have learned a good deal about the environmental consequences of nodule mining, which may lead to regulations that restrict the activity by companies based in democratic States. Civil society groups have also contributed to the rise of Marine Protected Areas, including in Antarctica, which is one of the strategies being used to slow the environmental degradation of the oceans.

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[57] The Arctic Sunrise Arbitration, *supra* note 54, ¶ 401.
[58] Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOR. AFF. 102, 116 (2000).
[59] BOSCO, *supra* note 1, at 226-27.
[60] Wataru Okada, *China's Coast Guard Law Challenges Rule-Based Order*, THE DIPLOMAT (April 28, 2021), https://thediplomat.com/2021/04/chinas-coast-guard-law-challenges-rule-based-order/.
[61] *Id.*
[62] Ginsburg, *supra* note 3, at 189.

IV.

I now turn to the role of law and democracy in confronting one of the greatest challenges of our time. The migrant crisis of recent decades has involved mass movements of persons from poor and desperate situations to richer and more secure ones. Itamar Mann argues that the seas constitute a "legal black hole": a zone of rightlessness.[63] Migrants located outside a State's "search and rescue" zone are beyond its jurisdiction and therefore beyond its duty to protect. The nominal rights of migrants outrun the duties of States in the domain of the oceans, leading to severe deficits of enforcement.

The migrant crisis—on land and sea—has generated wildly vacillating responses. At sea, the Italian government ran a program called Mare Nostrum from October 2013 to November 2014, rescuing migrants well beyond its official "search and rescue" zone. Then, in 2014, the European Union (EU) shifted gears and instituted Operation Triton, whose orientation was not to reduce but control migration. Operation Triton was subsequently replaced by Operation Sophia, a military operation with more resources to interdict migrants. These operations have resulted in ever greater challenges for migrants seeking to reach Europe. Between January 1, 2014 and early October, 2019, 33,631 migrants are presumed to have died in the Mediterranean Sea.[64] Since 2016, the EU claims its actions at sea have helped save over 500,000 migrants.[65] But others argue that it operates as a highly racialized border regime on the high seas.[66]

In response to this situation, a number of civil society organizations[67] purchased ships to engage in rescue.[68] Thus far, twenty-nine ships have been involved in such rescue operations by organizations including Sea-Watch,

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[63] Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347, 348 (2018).

[64] *Mediterranean Migrant Arrivals Reach 76,558 in 2019; Deaths Reach 1,071*, INTERNATIONAL ORGANIZATION FOR MIGRATION (Oct. 11, 2019), https://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071.

[65] Anja Radjenovic, *Search and Rescue in the Mediterranean*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (EPRS) (2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI(2021)659442_EN.pdf.

[66] *See generally* E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J., 445 (2022).

[67] For an overview of these groups and their tactics, *see generally* Eugenio Cusumano, *Humanitarians at Sea: Selective Emulation across Migrant Rescue NGOs in the Mediterranean Sea*, 40 CONTEMP. SEC. POL'Y 239 (2019).

[68] *June 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (June 19, 2020), https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities#publication-tab-1.

Mediterranean Saving Humans, SOS Mediterranean, and Medicins Sans Frontieres.

However, European governments thought that the private rescue efforts were undermining the restrictive migration policy and initiated a set of civil and administrative proceedings beginning in 2018. These proceedings grounded, and in some cases seized, rescue boats. COVID-19 put a further damper on operations.[69] The pandemic has led to a rapid decrease in the number of rescues performed by non-governmental organizations (NGOs). In 2018, as many laws criminalizing third-party rescue efforts went into effect, the number of migrants rescued by NGOs fell from 2017's near-all-time high of 46,601 to only 5,204—a decrease of about 89%.[70] By June 2020, due to "ongoing criminal proceedings, vessel seizures, and other restrictive measures imposed in response to the outbreak of the COVID-19 pandemic," the majority of NGO ships involved in search and rescue operations since 2016 were being held in ports, unable to resume operations.[71] Moreover, most of the ships have either been previously subjected to legal proceedings or are involved in ongoing legal proceedings.[72]

The European response is in some tension with the law of the sea. The UNCLOS requires rescue of those in danger at sea, even if not in the control or jurisdiction of a State.[73] This codifies a very old norm going back to the 17th century.[74] In relevant part, the UNCLOS requires captains "to render assistance to any person found at sea in danger of being lost" and requires coastal States to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea. . . ."[75] Various implications follow from these obligations. States cannot legally prohibit a vessel flying its flag from engaging in rescue at sea.[76] This obligation has been interpreted to apply not just to the high seas, but to exclusive economic zones as

[69] *Id.*
[70] Daniela Irrera, *Non-Governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?*, 25 EUR. FOREIGN AFFS. REV. 265, 281 (2019).
[71] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 68.
[72] *Id.*
[73] UNCLOS, *supra* note 29, at Art. 98.
[74] Mann, *supra* note 63, at 367.
[75] UNCLOS, supra note 29, at Art. 98(1)(a) and (2).
[76] Erik Røsæg, *The Duty to Rescue Refugees and Migrants at Sea, Oxford L. Border Criminologies Blog* (Mar. 25, 2020),https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/duty-rescue.

well as territorial waters.[77] In addition, the duty to render assistance at sea must be carried out in a non-discriminatory manner.[78] A separate obligation requires delivery to a safe place, presumably meaning that coastal States must accept rescuees.[79] Other agreements such as the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) also obligate States to coordinate search and rescue zones around their coasts.[80]

While these obligations primarily address States—both flag States and coastal States—they have implications for civil society actors who are caught between States. The so-called "*Tampa* affair" in 2001 is illustrative. When a Norwegian container ship, the *Tampa*, assisted in search and rescue operations for an Indonesian ship in the waters between Indonesia and Australia, it was subsequently denied permission to disembark in Australia.[81] This rejection sparked a reform to the SOLAS Convention and the SAR Convention. Amendments to these conventions adopted in 2004 supplemented the duty to rescue by defining rescue as "[a]n operation to retrieve persons in distress… and deliver them to a place of safety."[82] This means that coastal States risk breaching their duty to rescue when, as in the *Tampa* case, they interfere with the timely disembarkation of rescued persons, either by closing ports to ships carrying rescued persons or even denying those ships "innocent passage" through their territorial waters.

This element of the law of the sea becomes politically salient with respect to rescue operations of boat-borne refugees, economic migrants, or asylum-seekers, to whom States may wish to deny access to their territory. The 2004 version of SOLAS directed the IMO to develop guidelines for defining a "place of safety" in particular circumstances.[83] The IMO has issued guidelines noting, with respect to refugees and asylum-seekers in particular, "the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear or persecution would be threatened…"[84] It has further held that

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[77] Martin Ratcovich, *The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea*?, 33 AUST. Y.B. INT'L. L. 1, 84 (2015).

[78] *Id*. at 6; Cottone, *The Blurry Line between Smuggling and Rescuing Migrants According to the International Law of the Sea*, 49 QUADERNS DE RECERCA (BELLATERRA) MÀSTER UNIVERSITARI EN INTEGRACIÓ EUROPEA 1, 7–8 (2019).

[79] Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANCK Y.B. OF U.N. L. 205, 222-46 (2008).

[80] Id.

[81] Ben Doherty, *The Tampa Affair, 20 Years On: The Ship that Capsized Australia's Refugee Policy*, THE GUARDIAN (Aug 22, 2021), https://www.theguardian.com/australia-news/2021/aug/22/the-tampa-affair-20-years-on-the-ship-that-capsized-australias-refugee-policy.

[82] Ratcovich, *supra* note 77, at 9, 11.

[83] *Id*. at 11.

[84] *Guidelines on the Treatment of Persons Rescued at Sea Res.* MSC.167(78), INTERNAT'L MAR. ORG. (May 20, 2004).

a "place of safety" is a place "where the survivors' safety of life is no longer threatened… where their basic human needs (such as food, shelter and medical needs) can be met… and from which transportation arrangements can be made for the survivors' next or final destination."[85] Both of these mandates are commonly taken up by NGOs.

I take no position on whether the rescue of migrants is democratic or not. It certainly implicates human rights, which overlap with but are distinct from the majoritarian systems of democratic governance. European governments that have interfered with migrant rescue may be reflecting the majoritarian preferences of their publics. But it is also the case that the UNCLOS regime has facilitated contestation by civil society groups in the water. This can sometimes be achieved through strategic registration under the Flag of Convenience System, which has independently come under repeated criticism.[86] One unintended consequence of this system is that it allows civil society groups to challenge their own governments using international law, simply by changing their beneficial ownership to a third State. To be sure, the poor environmental and safety regulation practiced by the flag of convenience States is at odds with the preferences of most activists. But the rule does allow strategic behavior. One can think of this political contestation, drawing on Kim Lane Scheppele's metaphor of a two-level chessboard, in which moves to advance a policy position can be made at either level.[87] A national actor can, under some circumstances, internationalize themselves to take advantage of different and more beneficial rules.[88]

V.

When discussing the law of the sea, Harry Scheiber wrote that "we need to keep in mind that the heritage of ocean law has not been monolithic or without

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[85] Quoted in Office of the United Nations High Commissioner for Human Rights, '*Lethal Disregard': Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea,* 29, U.N. Doc. HR/PUB/18/4 (Sept. 2016). *See generally*, C. Heller & L. Pezzani, *Blaming the Rescuers*, available at https://blamingtherescuers.org.

[86] BOSCO, *supra* note 1, at 134-35.

[87] Kim Lane Scheppele, *The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space*, 28 PENN STATE INT'L L REV. 451, 451 (2010).

[88] This is not only true in the Law of the Sea. In a famous investment law dispute, *Tokios v. Ukraine,* a Ukrainian company set up a company in Lithuania. This allowed it to take advantage of a Bilateral Investment Treaty, which defined an investor as "*any entity* established under the laws." *See* Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 28 (April 29, 2004) 11 ICSID Rep. 305 (2007).

its own inconsistencies and contradictions."[89] The seas are increasingly a zone of civil society activism, in which groups exercise their rights to engage in expressive action, sometimes in defiance of their own governments. To the cases discussed in this lecture, one might add the group Women in Waves, which has sought to provide offshore access to abortion and contraception in countries that have limited access to those services. In *Women in Waves and Others v. Portugal*, the European Court of Human Rights ruled that norms of free expression found in the European Convention on Human Rights required member states to restrict this group only in ways that were proportional.[90] Another famous case involved the *Mavi Marmara* incident in 2010, in which a Turkish ship seeking to break Israel's blockade of Gaza was apprehended on the high seas, resulting in the loss of life of some activists.[91]

A space governed by no one means that global civil society can exercise voice as much as sovereign States can. Those States created the rules that now shape democratic contestation. This exposes a tension between the perspective that I have called "democracies *and* international law," which shows how democratic governments shaped much of international law, and the "democracy *of* international law" by which civil society groups use techniques from democratic contestation to challenge governments, including their own. I am not in a good position in the context of this short lecture to resolve this tension. But I have noted that both of these perspectives are distinct from the position being pushed by authoritarian regimes, which is to privilege state interests above all. Scheiber's comment about inconsistencies and contradictions will remain apt for some time to come.

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[89] Harry N. Scheiber, *Introduction*, to LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES XI, XIII (Harry N Scheiber ed., 2000).
[90] *See* Women on Waves and Others v. Portugal, No. 31276/05 Eur. Ct. H.R. (2009).
[91] U.N. Human Rights Council (UNHRC), *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, U.N. Doc. A/HRC/15/21 (2010).

APPENDIX I: ITLOS CASES

Name	**Claimant**	**Respondent**	**Filing Date**	**Topic**
M/V Saiga Case	Saint Vincent & the Grenadines	Guinea	11/11/1997	prompt release
M/V Saiga Case (No. 2)	Saint Vincent & the Grenadines	Guinea	2/20/1998	provisional measures
Southern Bluefin Tuna	New Zealand	Japan	7/30/1999	provisional measures
Southern Bluefin Tuna	Australia	Japan	7/30/1999	provisional measures
Camouco	Panama	France	1/17/2000	prompt release
Monte Confurco	Seychelles	France	11/24/2000	prompt release
Grand Prince	Belize	France	3/21/2001	prompt release
Chaisiri Reefer 2	Panama	Yemen	7/2/2001	prompt release
MOX Plant	Ireland	United Kingdom	11/9/2001	provisional measures & statement of the case
Volga	Russian Federation	Australia	12/29/2002	prompt release
Case concerning Land Reclamation by Singapore in and around the Straits of Johor	Malaysia	Singapore	9/4/2003	provisional measures
Juno Trader	Saint Vincent & the Grenadines	Guinea-Bissau	11/18/2004	prompt release
Hoshinmaru	Japan	Russian Federation	7/6/2007	prompt release
Tomimaru	Japan	Russian Federation	7/6/2007	prompt release
Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in	Bangladesh	Myanmar	12/13/2009	delimitation of maritime boundaries

the Bay of Bengal				
M/V Louisa	Saint Vincent & the Grenadines	Spain	11/23/2010	provisional measures
M/V Virginia G	Panama	Guinea-Bissau	7/4/2011	case transferred from another court
ARA Libertad	Argentina	Ghana	9/11/2012	provisional measures
Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission	Sub-Regional Fisheries Commission (SRFC)		3/27/2013	request for advisory opinion
Arctic Sunrise	Netherlands	Russian Federation	10/21/2013	provisional measures
Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean	Ghana	Cote d'Ivoire	12/3/2014	delimitation of maritime boundaries
Enrica Lexie Incident	Italy	India	6/26/2015	provisional measures
M/V Norstar	Panama	Italy	11/16/2015	contravention of LOSC provisions
Case concerning the detention of three Ukrainian naval vessels	Ukraine	Russian Federation	4/16/2019	provisional measures
M/T San Padre Pio	Switzerland	Nigeria	5/21/2019	provisional measures
M/T San Padre Pio (No. 2)	Switzerland	Nigeria	12/17/2019	arrest and detention

APPENDIX II: PCA ARBITRATIONS UNDER THE UNCLOS

Name	Claimant	Respondent	Filing Date	Topic
Dispute concerning the detention of Ukrainian naval vessels and servicemen	Ukraine	Russian Federation	4/1/2019	arrest and detention
The Enrica Lexie Incident	Italy	India	6/26/2015	provisional measures
The Artic Sunrise Arbitration	Netherlands	Russian Federation	10/4/2013	seizure and detention
The South China Sea Arbitration	The Philippines	China	1/22/2013	the role of historic rights and the source of maritime entitlements
Chagos Marine Protected Area Arbitration	Mauritius	United Kingdom	12/20/2010	delimitation of maritime boundaries
Barbados v. Trinidad & Tobago	Barbados	Trinidad & Tobago	2/16/2004	delimitation of maritime boundaries
Land Reclamation by Singapore in and around the Straits of Johor	Malaysia	Singapore	7/4/2003	land reclamation
Dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait	Ukraine	Russian Federation	9/16/2016	dispute concerning coastal state rights
The Duzgit Integrity Arbitration	Malta	São Tomé and Príncipe	10/22/2013	arrest and detention
The Atlanto-Scandian Herring Arbitration	Denmark (in respect of the Faroe Islands)	The European Union	8/16/2013	the interpretation and application of Article 63(1) of the UNCLOS in relation to the shared stock of Atlano-Scandian herring
The ARA Libertad Arbitration	Argentina	Ghana	10/29/2012	detention and court measures
Bay of Bengal Maritime Boundary Arbitration	Bangladesh	India	10/8/2009	delimitation of maritime boundaries
Guyana v. Suriname	Guyana	Suriname	2/24/2004	delimitation of maritime boundaries
The Mox Plant Case	Ireland	United Kingdom	10/25/2001	transboundary environmental impact